UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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WORLD TRADE CENTER PROPERTIES LLC; SILVERSTEIN PROPERTIES, INC.; SILVERSTEIN WTC MGMT. CO. LLC, 1 WORLD TRADE CENTER LLC; 2 WORLD TRADE CENTER LLC; 4 WORLD TRADE CENTER LLC; 5 WORLD TRADE CENTER LLC,

Plaintiffs,

-v.-

TRAVELERS INDEMNITY COMPANY,

Defendant.

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01 Civ. 12738 (JSM)

**OPINION & ORDER**

JOHN S. MARTIN, Jr., District Judge:

The terrorist attack on the World Trade Center did damage to human lives for which no amount of money can provide adequate compensation. It also did massive property damage for which monetary compensation is possible. At issue in this litigation is the extent of the liability of various insurance companies to provide that compensation to those who had an ownership interest in the World Trade Center Complex.

## THE PARTIES

In this opinion, the term "Silverstein Parties"[1] refers to entities that, after an extensive bidding process with the Port Authority of New York and New Jersey, entered into 99-year leases for the World Trade Center Complex in July 2001. These entities are controlled by Larry Silverstein, a successful New York-based real estate developer and businessman. In connection with the contemplated leases, the Silverstein Parties were obliged to procure first party property insurance coverage on the World Trade Center Properties, and the Silverstein Parties enlisted an insurance broker, Willis of New York, Inc. ("Willis"), to assemble an insurance program.

The insurance program set up by Willis was designed to be a layered program whereby claims of loss would be initially covered by a primary layer of insurance. When claims of loss exceeded the primary layer, coverage up to specified amounts would be provided by excess layers. The Silverstein Parties' insurance program consisted of a primary layer and eleven excess layers in which over twenty insurers and Lloyd's syndicates participated. Ultimately, the Silverstein Parties purchased property and

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[1]World Trade Center Properties LLC, Silverstein Properties, Inc., Silverstein WTC Mgmt. Co. LLC, 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, and 5 World Trade Center LLC. Each is a Delaware limited liability company with its principal place of business in New York, except for Silverstein Properties Inc., which is a New York corporation with its principal place of business in New York.

business interruption insurance for the World Trade Center Properties in the amount of $3.5468 billion.

The motion presently before the Court arises out of one of several actions involving the Silverstein Parties and their insurers which have been consolidated for pre-trial purposes. In this action, the Silverstein Parties, as Plaintiffs, are suing Defendant The Travelers Indemnity Company ("Travelers"), a Connecticut corporation with its principal place of business in Hartford, Connecticut. Of the $3.5468 billion, Travelers agreed to provide a total of $210,620,990 of coverage "per occurrence" in the primary and various excess layers.

The Silverstein Parties are also Defendants-Counterclaimants in a related action before this Court, SR Int'l Bus. Ins. Co., Ltd. v. World Trade Center Properties LLC, et al., 01 Civ. 9291 (S.D.N.Y. filed October 22, 2001)(JSM). In that action, Plaintiff Swiss Re seeks, *inter alia*, declaratory relief regarding the insurance entitlements of Defendants World Trade Center Properties LLC, Silverstein Properties Inc., Silverstein WTC Management Co. LLC, Westfield, Inc., The Port Authority of New York and New Jersey, GMAC Commercial Mortgage Corporation, UBS Warburg Real Estate Investments Inc., Westfield WTC LLC, Westfield Corporation Inc., Westfield America, Inc., 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, 5 World Trade Center LLC, and Wells Fargo Bank Minnesota

N.A., as Trustee for the registered holders of GMAC Commercial Mortgage Securities, Inc., Mortgage-Backed Pass-Through Certificates, Series 2001-WTC. (SR Int'l Compl.)

In response to the SR Int'l Complaint, the Silverstein Properties asserted counterclaims against numerous other insurers seeking monetary and declaratory relief in the SR Int'l action. (World Trade Center Properties LLC, et al. Am. Answer & Countercls., filed on February 6, 2002). The Counterclaim Defendants are Allianz Insurance Company, Copenhagen Reinsurance Co. (UK) Ltd., Employers Insurance of Wausau, Federal Insurance Company, Great Lakes Reinsurance (UK) PLC, Gulf Insurance Company, Hartford Fire Insurance Company, Houston Casualty Company, Industrial Risk Insurers, Lexington Insurance Co., Certain Underwriters at Lloyd's of London, QBE International Insurance Limited, Royal Indemnity Company, St. Paul Fire and Marine Insurance Co., Swiss Reinsurance Co. UK LTD., TIG Insurance Co., Tokio Marine and Fire Insurance Co., Twin City Fire Insurance Co., Wurttembergishce Versicherung AG, and Zurich American Insurance Co.[2]

While the motion currently before the Court involves only the claim against Travelers, the reasoning of the Court on this

[2]Additional cases have also been filed which relate to a similar body of facts.

motion is of vital interest to the other insurers and they have all been permitted to be heard on the motion.

DISCUSSION

The extent of the liability of the insurance carriers may ultimately depend upon resolution of the question:

> Which of the two following statements best describes what caused the destruction of the World Trade Center on September 11, 2001?
>
> 1) In a single coordinated attack, terrorists flew hijacked planes into the twin towers of the World Trade Center.
>
> 2) At 8:46 A.M. on the morning of September 11th, a hijacked airliner crashed into the North Tower of the World Trade Center, and 16 minutes later a second hijacked plane struck the South Tower.

Since most property damage insurance is written on a "per occurrence" basis - the maximum insured amount will be paid for each covered occurrence - the Court would normally expect to find the answer to the question whether the events of September 11th constituted one or two "occurrences" by looking at how the parties to the insurance contract defined that term in the policy they negotiated. In the case of the World Trade Center, however, with minor exceptions[3], there were no insurance policies in place

[3] For example, Allianz Insurance Company asserts that it issued two insurance policies to World Trade Center Properties prior to September 11, 2001. The Silverstein Parties, however, contend that these policies do not set forth the governing contractual terms. (See Mem. of Law of The Silverstein Parties in Opp. to the Mtn of Allianz Insurance Company to Dismiss the Silverstein Parties' Countercls., at 11.) Under the Allianz policies:

> [t]he word "occurrence" shall mean any one loss,

on September 11th, although each of the insurers had signed binders setting forth in summary form their agreement to provide property damage coverage. Some of these binders expressly stated that the precise language was "to be agreed upon."

Although Travelers had not issued a policy as of September 11th, three days later, it issued a policy providing $210,620,990 in property damage insurance for the World Trade Center "per occurrence." Despite the fact that the media had already reported the controversy over whether the attack on the World Trade Center constituted one or two "occurrences" for insurance purposes, the policy Travelers issued did not define the term "occurrence."

Plaintiffs now seek summary judgment contending that, since Travelers did not define the term "occurrence" in the policy, it agreed to be bound by the meaning given to that term in the decisions of the courts of the State of New York, where the coverage was negotiated. Plaintiffs argue that, with respect to

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> disaster or casualty, or series of losses, disasters or casualties arising out of one event. When the word applies to loss or losses from the perils of tornado, cyclone, hurricane, windstorm, hail, flood, earthquake, volcanic eruption, riot, riot attending a strike, civil commotion and vandalism and malicious mischief one event shall be construed to be all losses arising during a continuous period of seventy-two (72) hours. When filing proof of loss, the Insured may elect the moment at which the seventy-two hour period shall be deemed to have commenced, which shall not be earlier than when the first loss to the covered property or interests occurs.

(Aff. of Meyer G. Koplow and Exs. in Supp. of The Silverstein Parties' Opp. to the Mtn. of Allianz Insurance Co. to Dismiss the Silverstein Parties' Countercls., Ex. 4 at 37058.)

insurer liability, "occurrence" has a clear and unambiguous meaning under New York law and refers to the "immediate, efficient, physical, proximate cause of the loss, not some indirect or more remote cause of causes." (Pl.'s Reply Mem. at 17.)

For its part, Travelers contends that since there was no policy in place as of September 11th, the Court must look to the extrinsic evidence concerning the parties' negotiations, including the fact that Willis, the insurance broker for the Silverstein parties, had circulated to the insurers a policy form that included the following definition:

> "Occurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

(Boyd Aff. Ex. D.)

While Travelers and the other insurers raise a number of additional legal and factual arguments against the Silverstein Parties' contention that the Court can decide, as a matter of law, whether there were one or two "occurrences" on September 11th, the Court's view is that the dispositive issue on this motion is whether the term "occurrence" has such a clear and unambiguous meaning that the trier of fact should be barred from

considering the available extrinsic evidence concerning the meaning that the parties gave to that term when they were negotiating the insurance coverage for the World Trade Center.[4]

Before turning to the specific cases discussing the construction of insurance contracts under New York law, it is useful to look at the larger context in which our system of justice operates.

Several hundred years ago, Lord Chief Justice Coke observed that truth is "the mother of justice." Sir Edward Coke, Second Institute 524. Our system of justice is founded on the principle that litigation is to be a search for the truth; it is not some type of intellectual game that is circumscribed by the inflexible rules that define it. See Arthur T. Vanderbilt, Cases and Materials on Modern Procedure 10 (1952) ("The fundamental premise of the federal rules is that a trial is an orderly search for the truth in the interest of justice rather than a contest between two gladiators with surprise and technicalities as their chief weapons . . . .").

In conducting our search for the truth, we sometimes apply rules that may appear to obstruct the search for truth in an individual case because those rules will enhance the likelihood of finding the truth in a majority of cases. For example, by providing that certain types of contracts will be enforced only

[4] In view of the Court's resolution of this issue, there is no need to reach any of the other issues raised by the parties.

when evidenced by a writing, the Statute of Frauds seeks to protect against unfounded claims based on alleged oral contracts. Similarly, many states have Dead Man statutes that preclude interested parties from testifying to conversations with a deceased party in order to advance an interest adverse to the deceased.

For similar reasons, some states have adopted a strict rule that courts will not look behind the plain meaning of the words of a contract, no matter how strong the extrinsic evidence that the parties intended something other than that which is indicated by their words. New York is one of the states that rigidly adheres to this rule. As Judge Kaye explained in W.W.W. Assocs. v. Gianconteri, 77 N.Y.2d 157, 162 (1990):

> That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].)

However, the rule that the court will not consider extrinsic evidence that would vary the plain meaning of contract language only advances the search for the truth if the parties' intent can clearly be determined from the words they used. If contract language is ambiguous, then the courts should look to extrinsic evidence to determine the true intent of the parties. As Judge Jones observed in Hartford Accident & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 171-72 (1973):

> The objective in any question of the interpretation of a written contract, of course, is to determine "what is the

> intention of the parties as derived from the language employed" (4 Williston, Contracts [3d ed.], § 600, p. 280). At the same time the test on a motion for summary judgment is whether there are issues of fact properly to be resolved by a jury (CPLR 3212, subd. [b]). In general the courts have declared on countless occasions that it is the responsibility of the court to interpret written instruments (Williston, op. cit., § 601, p. 303). This is obviously so where there is no ambiguity. (Bethlehem Steel Co. v. Turner Constr. Co., 2 N.Y.2d 456.) If there is ambiguity in the terminology used, however, and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury (Restatement, 2d, Contracts, T. D. No. 5, § 238).

(Emphasis added.)

Is the term "occurrence" ambiguous? As Justice Holmes noted over eighty years ago, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159 (1918). The standard for determining whether a word is ambiguous is found in Curry Road Ltd. v. K Mart Corp., 893 F.2d 509, 511 (2d Cir. 1990):

> A term is ambiguous when it is "'capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.' " Walk-In Medical, 818 F.2d at 263 (quoting Eskimo Pie Corp. v. Whitelawn Dairies, Inc., 284 F. Supp. 987, 994 (S.D.N.Y. 1968) (Mansfield, J.)).

The history of litigation over the meaning of the term "occurrence" amply demonstrates that its meaning is far from unambiguous and must be divined from the particular context in which it is used. As Judge Stanton of this Court found in Witco

Corp. v. American Guarantee and Liability Ins. Co., 1999 WL 1000929, at *3 (S.D.N.Y. November 4, 1999):

> There is no all-inclusive definition of the term "occurrence" or any "formulation of a test [that is] applicable in every case, for the word has been employed in a number of senses and given varying meanings depending on the relative context." ' Home Ins. Co. v. Aetna Cas. & Sur. Co., 1977 U.S. Dist. LEXIS 13726, at *17 (S.D.N.Y. Sept 29, 1977) (citing McGroarty v. Great American Ins. Co., 36 N.Y.2d 358, 366 (1975)).

See also Safeguard Ins. Co. v. Angel Guardian Home, 946 F. Supp. 221, 230 (E.D.N.Y. 1996)("With respect to the type of liability AGH would foreseeably face, such as that alleged in the Thomas action, the definition of 'occurrence' is ambiguous."); Soc'y of Roman Catholic Church of Diocese of Lafayette & Lake Charles, Inc. v. Interstate Fire & Cas. Co., 26 F.3d 1359, 1364 (5th Cir. 1994); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1373 (E.D.N.Y. 1988).

This Court has presided over a sufficient number of insurance coverage cases to be aware that anyone "who is cognizant of the customs, practices, usages and terminology as generally understood in the insurance business" would agree with Judge Stanton that the term "occurrence," standing alone, is ambiguous and, for that reason, is often specifically defined in insurance policies. See E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 1999 WL 350857, at *15 (S.D.N.Y. June 2, 1999); U.S. Liab. Ins. Co. v. Albertell, 1992 WL 380024, at *6 (S.D.N.Y. Dec. 7, 1992); Stonewall Ins. Co. v. National Gypsum Co., 1992 WL 296435, at *2 (S.D.N.Y. October 6, 1992). Indeed, it apparently was because they viewed the

term "occurrence" as ambiguous that Plaintiff's insurance brokers circulated a specific definition of occurrence to the insurers they were soliciting.

While cases cited by the Silverstein Parties do construe the term "occurrence" without resort to extrinsic evidence, each of those cases must be read in light of the particular factual record before the court. For example, in Hartford Accident & Indem. Co. v. Wesolowski, on which Plaintiffs rely, the court did decide the issue as a matter of law, but only after noting, "As the parties agree, there is no relevant evidence extrinsic to the insurance policy bearing on the intention of the parties at the time of its execution. Thus, there is no question of credibility and there are no inferences to be drawn from extrinsic evidence." 33 N.Y.2d at 17.

Similarly, there does not appear to have been any relevant extrinsic evidence in Arthur A. Johnson Corp. v. Indem. Ins. Co. of North America, 7 N.Y.2d 222 (1959)(construing the word "accident") or in Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.3d 127 (2d Cir. 1986) (the issue of whether there were one or two occurrences was properly presented to a jury). In other cases on which Plaintiffs rely, the policies at issue contained specific definitions that the Court was construing. See Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's, 96 N.Y.2d 583 (2001); Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.. 73 F.3d 1178 (2d Cir. 1995).

The case that most strongly supports Plaintiffs' position is In re Prudential Lines, Inc., 158 F.3d 65 (2d Cir. 1998), but there the Court did not limit its consideration to the language of the policy alone, but also considered "the contracting parties' actions prior to the commencement of litigation. . . ." Id. at 79. To the extent that the Court rejected the insured's argument because it was contradicted by the plain meaning of the term "occurrence," it was finding no more than that the meaning for which the insured was arguing was outside any reasonable meaning of the term. A word may unambiguously exclude certain meanings while still being ambiguous in other contexts. See Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 653-53 (1993) ("Clauses can, of course, be ambiguous in one context and not another (compare, Hicks v. American Resources Ins. Co., 544 So.2d 952, 954 [Ala] [exclusion not ambiguous as *653 to acids, alkalis and toxic chemicals], with Molton, Allen, & Williams v. St. Paul Fire & Mar. Ins. Co., 347 So.2d 95, 99 [Ala] [exclusion is ambiguous with regard to "natural material"] )."). 

In sum, none of the relevant cases compels a finding that the term "occurrence" has such an unambiguous meaning that, in its search for the truth, justice should blind itself to the wealth of extrinsic evidence concerning the parties intentions that is available in this case. This includes the specific definition of the term occurrence circulated by the insurance agent for the Silverstein Parties, testimony and documents relating to the

negotiations prior to September 11th and the overall structure of the insurance program from the World Trade Center, and testimony and documentary evidence concerning statements made after September 11th by those who had been involved in negotiating the insurance contracts, in which they expressed their views on the question of whether there had been one or two occurrences.

While the Court is not unmindful of the Silverstein Parties' interest in obtaining a prompt decision concerning the amount of money the insurers will have to contribute to the rebuilding of the World Trade Center, that interest can not outweigh the interest of justice in insuring that the true extent of that liability is fairly and accurately determined.

For the foregoing reasons, the motion for summary judgment as to the liability of The Travelers Indemnity Company is denied.

**SO ORDERED.**

Dated: New York, New York

June 3, 2002

JOHN S. MARTIN, JR., U.S.D.J.

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